

NOT INTENDED FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBERS
	:	
HARRY L. CALLAWAY,	:	BANKRUPTCY CASE
	:	NO. 94-12108-WHD
Debtor.	:	
_____	:	
	:	
HARRY L. CALLAWAY,	:	ADVERSARY PROCEEDING
	:	NO. 04-1705
Plaintiff,	:	
	:	
v.	:	
	:	
INTERNAL REVENUE SERVICE,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Dismiss, filed by the United States of America, Internal Revenue Service (hereinafter the “Defendant”). The Plaintiff filed the instant complaint on January 23, 2004 against the Defendant. The Defendant filed an answer on March 18, 2004. On November 23, 2004, the Defendant filed the instant motion to dismiss the complaint.

First, the Court notes that the motion to dismiss has not been properly served. The Plaintiff filed a change of address with this Court on July 30, 2004. The Defendant has not served the motion to dismiss on the Plaintiff's address as it appears on the official court

docket, which is 2754 Fayetteville Road, Griffin, Georgia 30224. Accordingly, the Court cannot grant the Defendant's motion.

Second, the Defendant appears to have moved the Court for dismissal of the complaint on the basis that the Plaintiff's complaint fails to state a claim. The Defendant asserts that the Plaintiff's complaint is defective because statutory tax liens survive the discharge in bankruptcy of a debtor's personal liability for tax debts. The Court does not doubt the validity of this legal conclusion. However, as the Court understands the facts of this case, the Plaintiff's tax liability was not discharged in bankruptcy, but appears to have been paid as an allowed claim by the Chapter 7 trustee.

The Court's records, of which the Court takes judicial notice, reflect that the Plaintiff filed a voluntary petition under the Bankruptcy Code in 1994. Griffin Howell, III (hereinafter the "Trustee") was appointed as the Chapter 7 Trustee. The Plaintiff was a self-employed chiropractor, who owned substantial real property, much of which the Trustee liquidated during the course of the bankruptcy proceeding. The Defendant filed several proofs of claim in the case, asserting taxes owed on income, as well as trust fund taxes. The Trustee objected to the proofs of claim and asserted that the amounts filed were not accurate. These objections were resolved by the disallowance of several of the proofs of claim as duplicates. Additionally, it appears from the Trustee's objection and the order sustaining the objection that the Defendant agreed to subordinate all of its claims, including the secured and priority amounts, to the claims of the general unsecured creditors. *See* Case Number 94-

12108, Docket Number 471. This subordination did not impact the payment of the Defendant's claim, as the general unsecured creditors were paid in full with interest. According to the Trustee's final report, the entire allowed proof of claim filed by the Defendant was also paid in full with interest. *See* Trustee's Final Report, Case Number 94-12108, Docket Number 533.

In his complaint, the Plaintiff has asserted that the Defendant continues to maintain tax liens against his property for income taxes assessed in tax years 1993 and 1994. The various proofs of claim filed by the Defendant in the Plaintiff's bankruptcy case indicate that at least a portion of the Plaintiff's income tax liability for tax years 1993 and 1994 were included in the amount of the allowed proof of claim. *See* Proof of Claim Numbers 35 and 37. All information currently before the Court supports the Plaintiff's assertions that the Trustee has paid the full debt owed to the Defendant and, therefore, the tax liens should have been satisfied and cancelled. Consequently, the Defendant's contention that the complaint should be dismissed for failure to state of claim remains unsupported by any relevant legal argument or evidence, and the Court cannot dismiss the complaint at this time. For these reasons, the Defendant's Motion to Dismiss is hereby **DENIED without prejudice**.

The Court notes that a status conference was scheduled in this case with the hope that the parties could make some progress toward either resolving this matter or putting the case in a posture in which the Court could meaningfully address the issue raised by the Plaintiff. However, counsel for the Defendant failed to attend the status conference and assured the

Court that a dispositive motion would be filed. The instant motion falls somewhat short of this expectation. Unless some action is taken within the thirty (30) days, the Court will set the matter for trial.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of December, 2004.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE